



IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE

CASE NO. 280/04

In the matter between:

THABILE V. NKOSI

1st Applicant

JABULANI P. MABUZA

2nd Applicant

JOHN P. DLAMINI

3rd Applicant

MUZI MTHEMBU

4th Applicant

and

SAPPI USUTHU PULP COMPANY LIMITED

Respondent

Neutral citation: *Thabile V. Nkosi & Others v Sappi Usuthu Pulp Company 280/04 [2018] SZIC 43 (May 29, 2018)*

Coram: N. Nkonyane, J
(Sitting with G. Ndzinisa and D. Mango
Nominated Members of the Court)

Heard submissions: 23/03/18

Delivered judgement: 29/05/18

JUDGEMENT

1. This is an application for determination of an unresolved brought by the Applicants against the Respondent in terms of Section 85(2) of the Industrial Relations Act of 2000 as amended.
2. The Applicants are former employees of the Respondent. They were dismissed by the Respondent after they were found guilty of various acts of misconduct pertaining to the loan policies of the Respondent.
3. They did not accept the decision of dismissal and they reported a dispute with the Conciliation, Mediation and Arbitration Commission (CMAC). The dispute could not be resolved by conciliation and the matter was thus brought to this Court for the determination of the unresolved dispute.
4. The Applicants claim in their application that their dismissal was unlawful and unfair because;
 - 4.1 The Respondent did not have valid and fair grounds for terminating their services.
 - 4.2 In all the circumstances the termination of their services was unreasonable.

5. The Respondent denied that the dismissal of the Applicants was unfair or unlawful. In its Reply the Respondent stated that the dismissal of the Applicants was both lawful and fair in that the Applicants were found guilty of dishonesty by a properly constituted disciplinary hearing tribunal.
6. Four witnesses testified before the Court. On behalf of the Applicants, AW1, Muzikayise Mthembu and AW2, John Dlamini were led in evidence. On behalf of the Respondent, RW1, Mark John Antonie and RW2, Richard John Wells gave evidence in support of the Respondent's case.
7. The evidence led before the Court revealed that two of the Applicants were employed in the Human Resources Department and the other two were employed in the Finance Department. The Applicants were responsible, inter alia, for the processing of staff loans. They were guided in their duties by the company staff loan policies. The policies contained some checks and balances in both departments. The supervisor would sign and approve the granting of the loan on the understanding that the Applicants have applied all the checks and balances and that the loan was therefore deserved by the employee.
8. The Human Resources Department was expected to check if the employee applying for the loan had written or filled in the correct information. The employees in the Finance Department would then apply the affordability test to make sure that the loan applied for was within the employee's entitlement in terms of the policy.

9. The Applicants did not adhere to the policy requirements. This naturally led to the staff loan facility being abused. In the Human Resource Department, the employees were either not filling the application forms or when they did, they filled incorrect information. The 3rd Applicant, John Dlamini admitted under cross examination that the children's names that appeared in his application form were not that own of his children. He told the Court that he used a telephone to apply for the loan. When cross examined further on the issue of using false information, John Dlamini told the Court that the supervisor agreed that he could get the loan. AW1, Mzikayise Mthembu agreed under cross examination that the loans were not procedurally obtained. His defence was that his superiors approved the loan.
10. The evidence before the Court clearly showed that there was rampant abuse of the staff loan facility, thus the Applicants' defense that it was unfair that they were the only ones that were targeted because there were so many other employees that benefitted from the abuse of the staff loan facility. The Respondent's witnesses told the Court that there were other employees, other than the Applicants, that were disciplined. The Respondent also told the Court that the Applicants were disciplined because they were in positions of trust in the company and were responsible for the upholding of the policies of the company.
11. RW1, Richard John Wells, told the Court that he was the Financial Controller at the time relevant to the dispute before the Court. He told

the Court that the Applicants manipulated the facility and fraudulently obtained the loans. He told the Court that the 4th Applicant used names of children that were not his declared children as required by the company policy. He also told the Court that the 1st Applicant's motor vehicle broke down and she applied for an educational loan to attend to it which was contrary to the company policies.

12. The essence of the Respondent's case was that the four Applicants were involved in the manipulation of the rules relating to the staff loans such that they, and others, were able to obtain loans that they would not otherwise have been granted. The Applicants' defence was that the Respondent was unfair in its conduct of disciplining and dismissing them as that was being selective because the flouting of the policies was rampant at the Respondent's place.
13. The evidence revealed that after the loan application had been screened both in the Human Resources Department and the Finance Department, it would then go to the Divisional Manager who would approve the loan. The Divisional Manager would approve the loan based on the endorsement by the Human Resources Department and the Finance Department. There was no evidence that the Divisional Manager knew or was aware that the information was not correct and not in line with the policy requirements of the company.
14. The Applicants did not dispute that the policies were not followed. Their defence was that the flouting of the rules was rampant and that the rules were not being consistently enforced. In support of their defence the Applicants relied on the textbook by **PAK Le Roux and**

Andrea Van Niekerk: “The South African Law of Unfair Dismissal” at page 111 were the authors stated that;

“.....here employees who commit the same disciplinary offence contemporaneously or at roughly the same time are not all disciplined, or they receive different disciplinary penalties. In this case the unfairness is based on the proposition that similar cases should be treated the same way and that it is important that employees who commit the same offence should be all disciplined and subjected to the same disciplinary penalty. If this is not the case, the inference may be drawn that the employer administers discipline in an arbitrary or discriminatory way.”

In the present case however, the evidence revealed that the Applicants by virtue of their positions were the custodians of the company policies. They were employed in positions responsible for enforcing the checks and balances of the loan application process. The Divisional Manager approved the loans based on the information that had been checked by the Applicants and passed as correct. The Court therefore agrees with the Respondent that by virtue of their positions there was a higher duty of trust expected from the Applicants by the employer over and above the other employees of the company.

15. The Court will also come to the conclusion that the sanction of dismissal was appropriate in the circumstances of this case. In the case of **Oscar Mamba V Swaziland Development and Savings**

Bank, case number 81/1996 (IC), the Court held that one act of serious misconduct can have the effect of cancelling any prior unblemished disciplinary record. From the evidence led before the Court, the Court has no hesitation in coming to the conclusion that the relationship of trust that must exist between an employer and an employee was totally broken down. The Court in the case of **Kalik v Truworths (Gateway) & Others (2007) 28 ILJ 2769 (IC)** dealing with a similar subject before it held that;

“An employment relation that has broken down as a result of an act of dishonesty can never be restored by whatever mitigations. The underlying reason is that the employer cannot be expected to keep dishonest workers in his employment.”

The Court aligns itself fully with the above observations by the Court. Similarly, in this case the trust relationship is unlikely to be restored once dishonesty has been established.

16. In paragraph seven of the Applicants’ application the Applicants stated that their dismissal was automatically unfair. There was however no evidence led before the Court that showed that the dismissal of the Applicants was automatically unfair as envisaged by Section 2 of the Industrial Relations Act No.1 of 2000 as amended.
17. There was no allegation in the Applicants’ application that their dismissal was procedurally unfair. There was also no evidence led before the Court that the dismissal was procedurally unfair. There

- was no evidence that the disciplinary tribunal was not properly constituted or that the Applicants were not afforded the opportunity to appeal.
18. Taking into account all the evidence before the Court, the Court will come to the conclusion that the Respondent was able to prove on a balance of probabilities that the Applicants' dismissal was for a fair reason, and that taking into account all the circumstances of the case, it was reasonable to terminate the services of the Applicants.
19. The Court will accordingly make the following order;
- a) *The application is dismissed.*
 - b) *There is no order as to costs.*
43. The members agree.

A handwritten signature in black ink, consisting of a circular mark containing the letters 'NN' followed by a stylized, cursive signature.

N.NKONYANE

JUDGE OF THE INDUSTRIAL COURT OF SWAZILAND

For Applicant:

Mr. B. Gamedze

(Attorney at Musa M. Sibandze Attorneys)

For Respondent:

Mr. Z.D. Jele

(Attorney at Robinson Bertram)